INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and regulations involved	2
Statement	3
Argument	5
Conclusion	9
Appendix	10

CITATIONS

Case:	
United States v. *Balint*, 258 U. S. 250	8
Statutes:	
National Defense Act of June 3, 1916, Sec. 74, as amended by the Act of June 4, 1920, 41 Stat. 781 (32 U. S. C. 111)	10
National Defense Act of June 3, 1916, Sec. 75, 39 Stat. 202	11
National Defense Act of June 3, 1916, Sec. 125, as amended (10 U. S. C. 1393)	2, 7, 10
Act of June 4, 1920, Sec. 1, 41 Stat. 759	5, 10
Act of June 15, 1933, Sec. 12, 48 Stat. 158	11
Act of August 18, 1941, c. 362, § 2, 55 Stat. 626	5
Act of December 13, 1941, c. 571, § 2, 55 Stat. 799	5
Miscellaneous:	
Army Regulation 600–35:	
Sec. III:	
24	12
64	13
Army Regulation 600–40:	
Sec. IV:	
41	13
Executive Order No. 8530 (5 Fed. Reg. 3501)	5
Executive Order No. 8862 (6 Fed. Reg. 4319)	5

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 998

EDWARD PAGE GASTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia (R. 30–31) has not yet been reported. The opinion of the Municipal Court of Appeals for the District of Columbia (R. 17–26) is reported at 34 A. (2d) 353.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered April 10, 1944 (R. 32). The petition for a writ of certiorari was filed May 13, 1944. The jurisdiction of this Court is invoked under Section

240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

The principal questions presented by the petition for a writ of certiorari are:

1. Whether there was a fatal variance between the charge of the indictment and the Government's proof.

2. Whether, in a prosecution for illegally wearing a uniform of the United States Army, the Government is required to prove that the defendant intended to violate the statute.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and Army Regulations are set forth in the Appendix, *infra*, pp. 10–13.

STATEMENT

On April 14, 1943, an information was filed in the Municipal Court for the District of Columbia charging that petitioner "not being an officer or enlisted man of the United States Army, did wear the duly prescribed uniform of a Captain in the United States Army; and two 'U. S.' insignias on coat lapels, Captain's bars on shoulders", in violation of Section 125 of the National Defense Act of June 3, 1916, as amended (10 U. S. C. 1393, *infra*, p. 10) (R. 1–2). At the trial petitioner did not dispute the Government's proof that on

various occasions he wore a uniform described by witnesses as that of "a Captain in the United States Army" (R. 5–6). Instead, his defense was that the uniform he wore was that of a Captain of the New York National Guard and that he was authorized to wear the uniform. The evidence in respect of petitioner's defense may be summarized as follows:

On June 27, 1922, while petitioner was on the reserve list, the New York State Guard was federally recognized (R. 8, 18) and its enlisted personnel, as distinguished from the officer personnel, automatically became members of the National Guard organization (R. 8, 18). In respect of federal recognition of the officer personnel, the established procedure required that each officer make formal application for federal recognition, be approved by the examining board appointed by the Secretary of War, and be tendered an appointment by the President in the National Guard of the United States (R. 7–8; see also § 75 of the National Defense Act of June 3, 1916, *infra*, pp. 11–12). Upon completion of these requirements the officer received a commission as a reserve officer of the Army (R. 7). On cross-examination petitioner testified that he "has never appeared before any board of officers appointed by the Secretary of War for an examination of his fitness to become a reserve officer; he has never been examined by anyone; and he has never received

a commission as captain signed by the President" (R. 14). The official records of the War Department likewise fail to show that petitioner was ever commissioned as an officer of the National Guard (R. 7–9, 10–11). On three different occasions during the period from 1935 to 1938 petitioner was advised by the War Department that "you have never held an appointment in the Officers Reserve Corps of the Army and never have had any service in any other component of the Army of the United States" (R. 14–16).

Petitioner became a member of the New York State Guard as a private in May 1918 and in July of that year he was commissioned a Second Lieutenant. On December 30, 1918, he was placed on the state reserve list with the rank of Captain, and on October 11, 1926, he was honorably discharged from the Guard. (R. 8, 9, 11, 18.)[1]

The jury found petitioner guilty (R. 16) and he was sentenced to imprisonment for 90 days and to pay a fine of $150 (see R. 26). Upon successive appeals to the Municipal Court of Appeals

[1] Petitioner's proof showed that at various times after 1926, when he was honorably discharged, he was a member of the Reserve Officers Association and the Infantry Association, but he admitted that his membership in both of these organizations was obtained by filling out application forms wherein he supplied statements of his own experience and qualifications (R. 14). It was not shown that either organization has any official status.

and the United States Court of Appeals the judgment was affirmed (R. 17–26, 30–32).

ARGUMENT

1. Petitioner contends (Pet. 8–13) that because the letters "N. Y." were superimposed over the "U. S." insignia which he wore on the uniform, he was wearing the uniform of a Captain of the New York National Guard and that the proof therefore did not support the charge of the information that he wore the uniform of a Captain of the Army. Concededly, the uniform petitioner wore was one prescribed for a Captain of the New York National Guard, but that fact does not establish a variance. For by Congressional definition (10 U. S. C. 2, *infra*, p. 10) the New York National Guard unit with which petitioner had formerly been associated was at the time of the offense and is now a component part of the Army.[2] As such, its officers and enlisted men are required to wear the same uniform as other members of the

[2] We are advised by the National Guard Bureau of the War Department that the 87th Infantry Brigade, with which petitioner was associated (R. 11), became, subsequent to its federalization, part of the 44th Division. This Division was called into the active military service of the United States on September 16, 1940, by Executive Order No. 8530, dated August 31, 1940 (5 Fed. Reg. 3501–3502) and is still in active service (see Act of August 18, 1941, c. 362, § 2, 55 Stat. 626; Ex. Order No. 8862, August 21, 1941, 6 Fed. Reg. 4319; Act of December 13, 1941, c. 571, § 2, 55 Stat. 799, 800).

Army. Army Regulation 600–35 (*infra*, pp. 12–13), which prescribes the service uniform in minute detail, and Army Regulation 600–40 (*infra*, p. 13), which regulates the wearing of the uniform, make no distinction between the uniforms worn by officers of the National Guard units and officers of other component parts of the Army. The former regulation does provide, however, that in the case of officers of the National Guard units, the abbreviation of the name of the State of origin shall be superimposed on the "U. S." insignia which officers wear. Thus, in the case of an officer of a New York National Guard unit, the regulation provides that the letters "NY," 3/16ths of an inch in height, shall be superimposed on the letters "U. S.," 7/16ths of an inch in height, on the insignia which all officers wear. But the letters "NY" are plainly nothing more than an identifying symbol of the same character as insignia which other personnel of the Army wear to identify their particular units. That being so, it follows that the uniform petitioner wore was a uniform of a Captain of the Army and the proof was therefore consistent with the charge of the information.

Similarly, there is no merit in petitioner's contention (Pet. 13–17) that the information did not put him on notice that his National Guard status was in question. The information follows substantially the language of the statute and it speci-

fies the date of the offense and the particulars in which petitioner violated the statute. Petitioner plainly must have known from it that he was charged with illegally wearing the uniform which he wore on November 14, 1942, the date specified in the information (R. 1). Since, as he urges, that uniform might properly have been worn by a duly commissioned Captain of the New York National Guard, it necessarily was apparent that petitioner's lack of status in the New York National Guard was a significant issue in the case. His counsel's cross-examination of the witnesses (R. 6, 9, 10), as well as his own testimony (R. 11–12), clearly shows that his defense was prepared on the theory that that question was of signal importance.[3]

2. Despite the fact that Section 125 of the National Defense Act of June 3, 1916, as amended (*infra,* p. 10), unambiguously states that "It shall be unlawful for any person not an officer

[3] Petitioner also contends (Pet. 19–21) that the information charged him only with illegally wearing a complete uniform and that it was inadequate to charge violations as well by wearing a Captain's bars and the "U. S." insignia. As is shown by Army Regulation 600–40 (*infra*, p. 13), if petitioner was entitled to wear the uniform of a Captain of the New York National Guard, he would have been entitled to wear the bars and insignia as a part of that uniform. Consequently, we believe that petitioner's conviction must be sustained on the charge that he wore the entire uniform, and we therefore deem it unnecessary to argue the pleading question.

or enlisted man of the United States Army, Navy, or Marine Corps to wear the duly prescribed uniform of the United States Army, Navy, or Marine Corps" and does not specify any element of intent, petitioner now urges (Pet. 17–19), apparently for the first time (see R. 26, 30–31), that intent to violate the law is required and that scienter is an element of the offense. The statute, however, is clearly designed to protect the uniforms of the armed forces by unqualifiedly prohibiting their being worn by persons not legally authorized to wear them. As the court below concluded (R. 31), the statute is not capable of the construction for which petitioner contends:

> If a defendant intentionally wears a duly prescribed uniform of the United States Army * * * he is guilty under the statute if his act is actually unlawful regardless of his belief in the propriety of his conduct.

Any other construction of the Act would seriously impair its effectiveness. Cf. *United States* v. *Balint,* 258 U. S. 250.[4]

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[4] It is clear, in any event, that petitioner must have known that he had no right to wear the uniform in view of the repeated advice to him from the War Department that he had never held an appointment in the Officers Reserve Corps and had never had any service in any other component of the Army. (See p. 4, *supra.*)

CONCLUSION

The case was properly decided below and there is no conflict of decisions. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.[5]

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JUNE 1944.

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[5] Both courts below expressed the view that in the particular circumstances reflected by the record the sentence imposed on petitioner seems severe (R. 26, 31). We share the "hope" expressed by the United States Court of Appeals (R. 31) that should the conviction stand "the trial court will have an opportunity again to consider whether or not the sentence is too severe in the light of all the circumstances."